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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

A. D. JAMES, UNITED STATES MARSHAL for the Western District of Kentucky, and the United States, appellants,
v.
HENRY BOWMAN.

No. 213.

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REPLY BRIEF FOR THE UNITED STATES.

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Counsel for appellee, although admitting the power of Congress to punish bribery at Federal elections, contend that section 5507 of the Revised Statutes is unconstitutional because it is not *in terms* confined to such elections.

This contention is based upon the assumption that section 5507 relates to bribery in its broadest aspect, and not simply to bribery committed because of the race, color, or previous condition of the voter—a question which has never been decided, and which, in my view, it is not necessary to decide in this case.

But conceding, for the sake of argument, that section 5507 does relate to bribery *per se*, why should it

not stand, since it is within the power of Congress over Federal elections? The answer made is, that the statute contemplates State elections as well, and, in the language of the *Reese case* (92 U. S., 221), "the legislature can not set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who should be rightfully detained and who set at large."

But the language of the *Reese case* must be construed with reference to the particular question then before the court—the validity, or rather the *appropriateness*, of an act of Congress considered solely with reference to the power of that body, under the Fifteenth Amendment, to interfere at State elections. This is certainly not the question presented here.

I.

Both sections of the act of May 31, 1870 (16 Stat., 140), involved in the *Reese case*, were general in their nature, and, as the court held, either in terms or by necessary implication related to State as well as Federal elections. Section 3 provided that the offer to perform any act prerequisite to voting, if it failed because of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, should be deemed a performance of the act, and imposed a penalty upon the officer of elections wrongfully refusing to receive the vote of the person making the offer. Section 4 provided that any person unlawfully obstructing, or combining with others to

obstruct, any citizen from qualifying himself to vote, or from voting, should be punished as prescribed therein.

Neither of these sections, it will be observed, contained any reference to the Fifteenth Amendment, or to discrimination on account of race, color, or previous condition of servitude.

The question which the court decided in the *Reese case* is best stated in its own language (92 U. S., 216):

> In this court the United States abandon the first and third counts, *and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment* of the Constitution.
>
> After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, *because of their race, color, or previous condition of servitude.*

After stating that the Fifteenth Amendment does not confer the right of suffrage upon anyone, but prevents the States, or the United States, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition, which before its adoption could be done, and that the Amendment had invested citizens of the United States with the constitutional right to be exempt from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude—a right which, under the second

section of the Amendment, Congress could enforce by "appropriate legislation"—the court said (p. 218):

> This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment. *The effect of Article I, section 4 of the Constitution, in respect to elections for Senators and Representatives, is not now under consideration.*

The court then analyzed sections 3 and 4 of the act of 1870, and said (p. 220):

> In view of all these facts, we feel compelled to say that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, etc. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

The court then added (pp. 220–221):

> There is no attempt in the sections now under consideration to provide specifically for such an offense [an offense based on discrimination because of race, etc.]. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, *with its limited powers*, which is, in general language, broad

> enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific when, as expressed, it is general only.

In conclusion, the court said (pp. 221–222):

> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.
>
> *We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment*, and that the Circuit Court properly sustained the demurrers and gave judgment for the defendants.

Clearly, then, the only point decided in the Reese case was that Congress, in the exercise of its limited powers

under the Fifteenth Amendment, can not pass a statute for the enforcement of that Amendment which exceeds those powers, and expect the courts to uphold the statute by restricting it within the constitutional limits. The court did not say, or intimate, that the statute was unconstitutional as an exercise of the power of Congress under the fourth section of the First Article of the Constitution with reference to Federal elections. On the contrary, it expressly avoided that question. It merely held that the act was not "appropriate legislation" for the enforcement of the Fifteenth Amendment.

II.

The principle applied in the *Trade-Mark Cases* (100 U. S., 82) was precisely that enunciated in the *Reese case*, and is therefore equally inapplicable to the present case. The court itself recognized that fact. It said (p. 98):

> It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these Statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words

> used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. *This precise point was decided in United States* v. *Reese* (92 U. S., 214).

The act of Congress involved in the *Trade-Mark Cases* was, as the court held, general in its nature: "It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected" (100 U. S., p. 97). But the only power which Congress had over the subject of trade-marks was that derived from the commerce clause of the Constitution, and was limited to trade-marks which might be used in interstate or foreign commerce. It was absolutely essential, therefore, as the court held, that Congress, when legislating on the subject of trade-marks, should keep within the confines of its jurisdiction, and in the act itself indicate that it was dealing only with trade-marks in their relation to interstate or foreign commerce.

But the situation is very different when Congress is legislating in the exercise of its broad, general power over a given subject. If, for instance, in legislating generally on the subject of interstate and foreign commerce, an act of Congress should contain provisions on the subject of trade-marks, which, under one construction, might be made to apply to trade-marks generally, whether used in interstate or foreign commerce or not,

it is manifest the court would refuse to adopt such a construction and hold that the act was void because it was not *in terms* confined to the legislative domain. On the contrary, the court would say it must be presumed that Congress was legislating with regard simply to the subject within its constitutional control. This, in fact, is what the court did say or imply in the *Trade-Mark Cases* (100 U. S., 96):

> When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, *or from its essential nature*, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not *so* limited, it is in excess of the power of Congress.

In such a case, therefore, it is the intention on the part of Congress *to go outside its jurisdiction*, which must be clearly and explicitly shown.

So, in the present case, Congress, as this court has held, possesses "plenary and paramount jurisdiction over the whole subject" of Federal elections (*Siebold case*). It also has a limited control over State elections. Shall it be said, then, unless it clearly and explicitly appears from the language used, that an act of Congress, which is authorized only with respect to Federal elections, was intended to embrace State elections, is void unless it is *in terms* confined to Federal elections? Such a rule would be diametrically opposed to the well-settled principles of statutory construction, namely, that a statute shall not be held

unconstitutional unless it is "clearly and palpably" so; and that, where two constructions are possible, the one which supports the statute will be adopted.

The rule in regard to the strict construction of penal statutes also throws some light on this subject. It would probably be argued, in a case arising under section 5507 at a State election, that that section had no application, because it does not plainly appear that it was intended to apply to such elections; that it applies to intimidation and bribery generally, and not to such offenses committed because of the race, color, or previous condition of the voter; and that Congress possesses the power to punish those acts, when the discriminative element is absent, only when committed at Federal elections.

III.

The fact that section 5507 refers to "persons to whom the right of suffrage is guaranteed by the Fifteenth Amendment," does not necessarily imply that Congress was legislating, as counsel assume, simply for the enforcement of the Fifteenth Amendment, and in virtue only of the power given by that Amendment. Congress was undoubtedly legislating primarily, so far as its immediate purpose was concerned, for the protection of the particular class of persons to whom the right of suffrage was, as matter of fact, not only guaranteed but *secured*, or intended to be secured, by the Fifteenth Amendment—the Negro race. But the court would be no more justified in saying that Congress, in the passage of the act in question, was legislating solely

in virtue of the power derived from the Fifteenth Amendment, because of the reference to that Amendment, than in holding that the Fifteenth Amendment was itself applicable only to the Negro race, because it had its origin in the peculiar circumstances attending that race after their emancipation.

IV.

But the only inquiry, I submit, on this record is whether section 5507 is a legitimate exertion of constitutional power for the protection of voters at *Federal* elections. The question as to its application to State elections may be considered when a proper case arises. It is no more necessary for this court now to consider whether the statute is constitutional in respect of State elections, than it was for the court in the *Yarbrough case* to determine whether section 5508 was valid as applied to State elections. That section was equally general in its terms, and could be said with equal force to have contemplated State as well as Federal elections—in fact, it has been so regarded. But this court did not deem it necessary to enter into that question in the *Yarbrough case*, and it was left for the Circuit Court of Appeals for the Sixth Circuit (in the *Karem case;* appendix to appellee's brief) to determine that section 5508 "is not appropriate legislation for the enforcement of the Fifteenth Amendment." Would this court, if that view had been announced earlier, have declared that, *for that reason*, section 5508 was not constitutional as applied to cases arising under it at Federal elections?

V.

In order to minimize the effect of the decision of the Circuit Court for the Eastern District of Virginia in the *Munford case* (16 Fed. Rep., 223), counsel emphasize its statement (p. 227) that Congress, after the argument in the *Reese case*, reenacted the section there in question (sec. 4 of the act of 1870; sec. 5506 R. S.), "leaving out the words which, in the case of Reese, had been considered to bring it under the Fifteenth Amendment." If this statement means what counsel would have the court imply—that the Circuit Court thought that, because the original statute could have been construed to apply to State elections, it would have been invalid as to Federal elections—the language of that court at the close of its opinion is inexplicable. It said (p. 228):

> The court in the *Reese case* decided that section 5506 was not appropriate legislation to enforce the Fifteenth Amendment. The section said nothing of race, color, and previous condition. It was at a municipal election, and therefore was not within the power of Congress under section 4, Article 1, of the Constitution, which gives power to Congress over Federal elections. *Had the same crime been committed at a Federal election* the court would, we think, have found the authority for section 5506 *under the fourth section, Article 1,* above recited.

It is to be observed that when the Circuit Court said, in the paragraph quoted, that "Had the same crime been committed at a Federal election the court would, we think, have found the authority for *section*

5506 under the fourth section, Article 1," it meant section 4 of the act of 1870. This is clear from the first line of that paragraph, "The court in the *Reese case* decided that *section 5506* was not appropriate legislation to enforce the Fifteenth Amendment." The Circuit Court undoubtedly referred, in both instances, to the original statute, which was before the Supreme Court in the *Reese case*.

The concurring opinion of Judge Hughes makes this point perfectly clear. Referring to the opinion of this court in the *Reese case*, he said (p 229):

> Its opinion in *Reese et al.* was expressly confined to *section 4 of the act of 1870* in its relation to State elections, and the court held that section not to be within the purview of the Fifteenth Amendment of the Constitution. But, even as to that section, the court did not, *and took especial pains not to*, decide that the section was beyond the purview of the first Article of the Constitution.

In view of the principles subsequently announced in the *Yarbrough case*, the surmise of the Circuit Court in the *Munford case*, as to the probable position that would have been taken by this court in the *Reese case*, if the constitutionality of section 4 of the act of 1870 had been considered, in a case arising at a Federal election, with respect to the power of Congress under the fourth section of Article I of the Constitution, would seem to be correct.

VI.

In the *Reese case*, as already observed, this court decided, and only decided, that the statutes under con-

sideration were not "appropriate legislation" for the enforcement of the Fifteenth Amendment—that if Congress, in the exercise of its *limited* power under that Amendment, enacted legislation which exceeded that power, such legislation must fall, because the courts had no authority to amend or restrict a statute by construction so as to confine it within constitutional limits. It was not decided in the *Reese case*—and it can not be held to have been decided—that the statutes then under consideration were invalid as applied to Federal elections because they were not "appropriate legislation" to enforce the Fifteenth Amendment. The consideration of all questions not arising out of the enforcement of the Fifteenth Amendment—and perticularly the power of Congress over Federal elections under the fourth section of the First Article of the Constitution—was, as stated, waived by counsel and avoided by the court. *Is not this fact itself a complete answer to appellee's contention? Does it not show that, in a case arising under a general statute, it is not necessary to consider the validity of the statute from any other point of view than that presented by the record?*

If the court *had* considered the constitutionality of the sections of the Enforcement Act involved in the *Reese case* in the light of the power of Congress under the First Article of the Constitution, it would have been confronted with this proposition: Congress, under that Article, has plenary and paramount jurisdiction over Federal elections, and, in virtue of the Fifteenth Amendment, has the additional right to prevent discrimination against citizens of the United States in the exercise of their right to vote at all elections, State and

Federal; but the sections under consideration made no provision for acts committed because of the race, etc., of the citizen. The inevitable conclusion would therefore have been that those sections were not "appropriate legislation" to enforce the Fifteenth Amendment, and consequently did not apply to State elections, *but were limited in their application to Federal elections* which Congress was authorized so to protect.

VII.

In the present case, if the words in section 5507, "persons to whom that right [of suffrage] is guaranteed by the Fifteenth Amendment," are to be treated as merely descriptive, and to mean "citizens of the United States without regard to race, color, or previous condition of servitude, otherwise qualified to vote," then we have a statute which provides simply for punishing the bribery or intimidation of citizens of the United States in the matter of voting. In a case, therefore, like the present one, of bribery committed at a *Congressional* election, the question is merely whether the statute is applicable. Will the court go beyond the necessities of such a case and say that, while the statute covers offenses committed at Federal elections, it is questionable whether it does not cover or attempt to cover similar offenses committed at a State election; that the latter fact must be inquired into, and if it be found that Congress may have intended to embrace acts not within its jurisdiction over State elections, the statute is void with respect to Federal elections? Is it not the better rule, as already suggested, to say that Congress must be presumed, until the contrary is plainly shown, to

have intended to keep within its constitutional jurisdiction? Will it not be held that a statute, general in its nature, must be construed as applying to the subject over which Congress has general control? And if the application of a general law to a particular kindred subject, over which Congress has but a limited control, is to be considered at all in a case which directly involves only its application to an individual or object manifestly within the *general* class and the *broad* power, will the law be held to extend to the kindred subject (and for that reason, if that *be* a sufficient reason, adjudged unconstitutional) unless its language is so clear and explicit as unavoidably to require such a construction?

VIII.

The questions as to the constitutionality of section 5507 in respect of Federal elections, and its application or constitutionality as to State elections, are, I submit, distinct and separable. The validity of the statute in the one case can not be made to depend upon its validity, or the circumstances which would control its validity, in the other case. It can not be doubted that a law containing no substantive provision beyond the power of Congress—no provision clearly encroaching upon a field outside the competency of Congress—is none the less constitutional because there are *occasions* (in this instance, State elections) with respect to which its application might be challenged.

In a case arising under section 5507 at a *Federal* election, it can not be said, as was said in the *Reese case* (where the acts in question were committed at a *State* election), that section 5507 provides for an OFFENSE

not within the jurisdiction of Congress. The power of Congress to punish bribery *per se* at a Federal election, without regard to motive, is not and can not be disputed. The court would not therefore, in such a case, which is *this* case, be called upon (as in the *Reese case*) to alter or amend the statute so as to make it relate to an OFFENSE within the control of Congress. Whether section 5507 relate to bribery pure and simple, or to bribery committed because of the race, color, or previous condition of the voter, it is entirely within the power of Congress over Federal elections. The power to punish bribery *per se* being conceded, no question can be raised as to the power to punish bribery for any cause. The greater power necessarily includes the less.

The argument of counsel for appellee is therefore reduced to this—and it would be unworthy serious consideration if it had not *apparent* support in what was said by the court in the *Reese* and *Trade-Mark cases:* The statute is invalid, not because it exceeds the authority of Congress over Federal elections, but because *possibly* it may also contemplate State elections, and, *if so construed*, it may be doubted whether the offense for which it provides is within the power of Congress over *such* elections, in which case—for this purely hypothetical defect the statute, otherwise sound, is necessarily invalidated in all its parts. It is to be hoped the court will enjoy this trip around Robin Hood's barn in order to discover wherein section 5507 is unconstitutional with respect to Federal elections.

HENRY M. HOYT,
Solicitor-General.

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BRIEF FOR APPELLEE.

SWAGAR SHERLEY,
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(18,357.)

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

STATEMENT.

In December, 1900, an indictment was found by the United States district court for the district of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "negroes, colored men, men of African descent,

and not white men," being citizens of Kentucky and of the United States, were unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the fifth congressional district of Kentucky on the 8th day of November, 1898, for the election of a Representative in the Fifty-sixth Congress of the United States, by means of bribery.

No allegation is made that the bribery was because of the race, color, or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of *habeas corpus* on the ground of the unconstitutionality of section 5507. The district judge granted the writ, following reluctantly the decision of the circuit court of appeals for the sixth circuit, rendered in the case of Lackey *v.* United States, 46 C. C. A., 189. From that judgment the Government has taken this appeal.

ARGUMENT.

It may simplify somewhat the question to be decided if we set forth just what, in our judgment, as shown by the decisions of this court, the power of Congress is and the sources of that power, both as to Federal and State elections, and then consider how far Congress has by appropriate legislation exercised such power. We shall therefore briefly state our conclusions and then show the basis for them.

1. Congress has power, irrespective of the fifteenth amendment, to make punishable offenses committed at a Federal election, and this power is not limited to

offenses committed against the negro, nor because of race prejudice, &c.; nor is it limited to offenses of a State or some agency of a State, but applies to the individual citizen.

2. The fifteenth amendment is the only source of power that Congress has as to State elections; and both as to State and Federal elections the power it confers upon Congress for the punishment of offenses against the suffrage is limited to offenses against citizens because of race prejudice, &c., and when committed by the United States or a State, or some officer or agent of the United States or a State.

3. There is now no statute relating to offenses committed at a Federal election based on the power derived by Congress from the Constitution, irrespective of the power given by the fifteenth amendment, except section 5508, which is not involved in this case.

a. Section 5507, upon which the indictment is founded, is based by its terms upon the fifteenth amendment, but is not appropriate legislation thereunder.

b. It is not within the province of the courts to so limit a statute by judicial construction as to make it operate only as to that which Congress may rightfully prohibit and punish.

I.

That Congress has power to control Federal elections and to make punishable offenses committed against the suffrage at such elections, irrespective of any power derived from the fifteenth amendment, has been determined by this court in several instances. In the case of *Ex parte* Siebold, 100 U. S., 375, and in *Ex parte* Clarke, 100 U. S., 399, this right was expressly recognized. Those cases came before this court by virtue of a writ of *habeas corpus* sued out by Siebold, Clarke, and others, based on the unconstitutionality of certain sections of the enforcement act, under which indictments had been found against them. *These sections related to congressional elections only.* Section 5515 made it a penal offense for any officer of election at a congressional election to neglect to perform or to violate any duty in regard to such election, whether required by a State or a United States law. Section 5522 made it a penal offense for any person to obstruct, bribe, or interfere with a supervisor of election or marshal in the performance of any duty required of them by any United States law, &c. All the indicted men were officers of election. Justice Bradley, in rendering the decision of this court, held these sections constitutional and in emphatic language declared the power of Congress to regulate and control Federal elections and make punishable offenses committed at such elections. Such power in Congress was not rested upon the fifteenth amendment, but on the provisions relative to the election of Representatives and the broad power of protecting the sources of its own existence. In the case of *Ex parte* Yarbrough, 110 U. S., 651,

these cases were approved and followed, and so far as the actual facts decided, the court went a step further and held an indictment under sections 5508 and 5520 found against an individual citizen, not an officer of an election, to be good. These cases were further approved in Logan *v.* United States, 144 U. S., 263. This power of Congress in congressional elections, founded on the Constitution irrespective of the fifteenth amendment, it is needless to say is not restricted to offenses committed on account of race, color, or previous condition of servitude, nor to acts of State or Federal governments or their agents. It was perhaps unnecessary to speak of these cases here or to discuss this head, as counsel for the Government and ourselves are in accord as to the power of Congress in regard to congressional elections. But since, in our judgment, counsel has overlooked the difference between the power of Congress and the exercise of that power by appropriate legislation, we have thought it well to make plain our assent to the proposition of the power of Congress that it may not be confused with the other question which we discuss later. It may be noticed in passing that none of the sections considered in the cases quoted above are involved in the case at bar.

II.

The fifteenth amendment provides:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation."

This amendment is the sole source of power whereby Congress is vested with the right to legislate as to State elections, but it is in addition to this a curb on the power of Congress to legislate as to congressional elections. By its very terms it applies both to the Federal and State governments. What is prohibited to one is also prohibited to the other. The effect is to both enlarge and curtail congressional power. Prior to its adoption the States could fix what qualifications or make such discriminations they thought fit as to the right to the franchise; now, so far as race, color, or previous condition of servitude is concerned, they may not. It did not confer the right to vote; it only removed certain disabilities from such right. Practically, where the only disabilities existing were those growing out of race or color, it did, by the removal of them, give indirectly the right—that is, it gave an equal right to the negro with the white man to vote, but it is still within the province of the State to take away from both the white man and the negro the right to vote because of some condition or requisite other than race, color, or previous condition of servitude. With equal force does it apply to the United States. If it were possible now for a State to limit the franchise to white men, Congress could not adopt such limitation as to the suffrage in congressional elections.

The second clause of the fifteenth amendment provides that "the Congress shall have the power to enforce this article by appropriate legislation." Now, in order for legislation making penal acts against the suffrage to be appropriate legislation *under this amendment*, such acts must be committed on account of race, color, or previous condition of servitude, and must be committed by the State or some agent of the State clothed with State power, though not

necessarily acting within or in accordance with such State power. *So far as this amendment is concerned*, and we are now to be considered as limiting ourselves to it, the same would be true as to the United States and its officers or agents.

That these views are in full accord with the decisions of this court we feel confident. In United States *v.* Reese, 92 U. S., 214, the court said :

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not.

"If citizens of one race, having certain qualifications are permitted by law to vote, those of another have the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In U. S. *v.* Cruikshank, 1 Woods, 308, Justice Bradley, referring to this amendment, said :

"It does not confer the right to vote. That is the prerogative of the State laws. It only confers a right not to be

excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce."

And again:

"It is not the right to vote which is guaranteed to all citizens. Congress cannot interfere with the regulation of that right by the States except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The State may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

On appeal (United States *v.* Cruikshank, 92 U. S., 555), this court, through Chief Justice Waite, said:

"In Minor *v.* Happersett, 21 Wall., 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States *v.* Reese *et al.*, *supra*, we held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

It is true that these views were explained in *Ex parte* Yarbrough, and so far as the statement that "the Constitution of

the United States does not confer the right of suffrage upon any one" is concerned, were repudiated, yet nothing in that case changed the court's position so far as the fifteenth amendment is concerned. In the Yarbrough case the court, dealing with a Federal election, left the fifteenth amendment, and under section 4 of article I of the Constitution found power relative to the right of suffrage in such elections. Congressional legislation relating only to that amendment is subject to the limitations declared in the Reese and Cruikshank cases, and is not enlarged by anything said in the Yarbrough case.

The circuit court of appeals for the sixth circuit has just rendered a decision involving these questions in the case of Karem *v.* United States. The opinion has not yet been reported in any publication, but we have received a record copy from which we quote. Karem, with certain other persons, was indicted in the district court for the western district of Kentucky for violation of section 5508 of the Revised Statutes. The indictment, in substance, charged him with having conspired with others to injure, oppress, threaten, and intimidate certain negroes in the free exercise of the right of suffrage at a State election on account of their race, color, and previous condition of servitude. Section 5508 provides:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoy-

ment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The circuit court of appeals held that said section did not embrace offenses committed at a State election and reversed the case, with instructions to sustain the demurrer to the indictment. The court, after commenting on the fact that section 5508 was not dependent upon the fifteenth amendment for its validity and reviewing the Yarbrough case and others, said:

"The fifteenth amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the constitution and laws of the State, the power of the State to prescribe qualifications being limited in only one particular.

"The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

"There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article.

"1st. Legislation authorized by the amendment must be addressed to State action in some form or through some agency.

"2d. It must be limited to dealing with discrimination on account of race, color or condition.

"These in their order:

"First. That State and not individual action is the subject of this article would seem clear from many considerations.

"The right to vote in a purely State election being, as we have seen, a right granted by and dependent upon the law of the State, is therefore a right which can only be denied or abridged by the State.

"The amendment is therefore in terms addressed to State action. Action by the United States and by the State in contravention of this right of non-discrimination on account of race, color, or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing constitutions and laws and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color, and condition, and that the power of Congress to enforce it is, therefore, limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation.

"We think this too narrow a view of this article. Although it has reference to State and not individual action, it has a wider scope than the mere nullification or inhibition of State legislative action, and avoids and inhibits, not only State legislation, but all State action of every kind, and by every one assuming to exercise the power of the State, whether the State's authority be exceeded or not.

"When the Constitution speaks of a State and inhibits the doing of certain things, it sometimes includes under the term State every instrumentality or agency of the State which presumes to act by authority of the State, and in other cases the action of the State in its sovereign or legislative character is alone referred to.

"It is true that this amendment is not limited to the prohibition of '*laws*' denying or abridging the elective function. For this very reason we conclude that legislation

enforcing it may be corrective of any State action, whether based on State laws authorizing discrimination or not. With the exception of the first clause of the first section of the fourteenth amendment, that section is, like the fifteenth amendment, addressed broadly to the State. The other clauses of that section read as follows:

"'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Each of the clauses quoted above has been authoritatively construed as addressed to State action in some form and not to mere individual conduct.

> "Slaughter House case, 16 Wall., 36; *Ex parte* Virginia, 100 U. S., 339; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629, 638; Virginia *v.* Rives, 100 U. S., 313; Civil Rights case, 109 U. S., 3, 11; Chicago, B. & Q. R'd *v.* Chicago, 166 U. S., 226."

The court then quotes at length from these cases and continues:

"The principles of interpretation applicable to the first section of the fourteenth amendment are equally applicable to the construction of the fifteenth amendment.

"The right to vote in their own elections is derived from and secured by the laws of the State. The amendment simply limits State power in respect to suffrage at State elections by prohibiting discriminations in the enjoyment of the elective franchise on account of race, color, or condition.

"The right to vote in its own election can be conferred only by the State. No one, therefore, but the State can 'deny or abridge' the right to vote. The amendment is therefore

addressed to the State. Individuals may by unlawful force or fraud prevent an otherwise lawful voter from voting; but it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged.

"Individuals cannot deny or abidge the right of suffrage for they cannot confer it. It is a right which is secured by and dependent upon law. Individuals cannot make, construe or administer law, they, therefore, cannot 'deny or abridge' a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the fifteenth amendment there must be some act of the State, through its legislative, judicial or executive departments. Some one exercising the power of the State, whether with or without the sanction of the law of the State, must deny to otherwise qualified voters the right to vote on account of race, color or condition. That would be an act of the State and such act might be made an offense against the United States by virtue of the power granted by the fifteenth amendment. To justify legislation directed to the mere lawless acts of individuals, even though such acts be based upon color or race, would be to enter the domain of the police power of the State. We speak only of purely State elections, for the power of Congress over its own elections rests upon altogeter different principles.

"There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a State or municipal election, even though the intimidation be grounded upon race, color or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the fourteenth and the fifteenth amendments

are addressed to State action through some channel exercising the power of the State.

"Second. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color or condition. The act commonly known as the enforcement act, being the act of May 31, 1870, 16 S. L., 140, contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth and fifth. The first has been carried into the Revised Statutes as section 2004. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the fifteenth amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color or previous condition of servitude, and were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under this article. United States *v.* Reese, 92 U. S., 214; Lackey *v.* United States, 46 C. C. A., 189."

It is apparent that while the circuit court of appeals in the Karem case was addressing itself to State elections, *that so far as the fifteenth amendment, and the power derived alone therefrom*, the reasoning is equally applicable and valid as to Federal elections, and as to limitations upon the United States Government as well as the State governments. In other words, as stated earlier, the fifteenth amendment applies to the Federal and State governments in exactly the same way, and it is only when considering other provisions

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of the Constitution that congressional power over Federal elections is enlarged beyond that existing as to State elections. We do not believe these views will be controverted by counsel for the Government. We turn, then, to a consideration of how Congress has exercised the powers it possesses, and it is here that the real issue between Government counsel and ourselves arises.

III.

It is not contended that there are any statutes relating to offenses at Federal elections other than sections 5507 and 5508. Section 5508 is a conspiracy section and is not involved here. The whole case, then, narrows down to the question of whether Congress has constitutionally exercised the power given it over offenses of bribery committed at Federal elections. That it has the power to make punishable such offenses we conceded in the fore part of this brief.

That section 5507 was intended to be appropriate legislation under the fifteenth amendment only is, we think, apparent. It was so regarded by the district judge below, and in the opinion of that court, referring to this section, it is said: "Is this appropriate legislation, and within the power of Congress, under section 2 of the fifteenth amendment"? (R., p. 18.) And nowhere in that opinion is there any attempt to base the constitutionality of the section upon other clauses of the Constitution. The circuit court of appeals in the Lackey case (46 C. C. A., 189) considered the section in the same light.

The language of the section shows plainly that it was in-

tended to apply to *all* elections, and was legislation meant to carry out the provisions of the fifteenth amendment. The section provides that—

"*Every person* who prevents, hinders, controls, or intimidates another from exercising or in exercising *the right of suffrage*, to whom that right is guaranteed by the *fifteenth amendment to the Constitution of the United States*, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

There are no words qualifying the words "right of suffrage" to Federal elections. It was intended to protect the suffrage at State elections as well as Federal. The reference to the fifteenth amendment plainly shows that Congress had in mind that amendment and was legislating as to all elections, for only under that amendment can Congress legislate as to State elections. If it had been meant to apply only to Federal elections, no reference would have been made to the fifteenth amendment, for without it Congress could so legislate. As well said by Judge Lurton in the Lackey case:

"It is not limited in its operation to congressional or presidential elections, nor to offenses grounded upon race, color or previous condition of servitude. Reading the section in connection with the other parts of the act from which it was taken, it is too obvious for discussion that Congress intended that it should have operation *in all elections*, and should not be limited to obstructions to the free exercise of the elective franchise based upon race, etc."

That the section is not appropriate legislation under the amendment, though based on it, is, we think, apparent. This was the exact question decided by the Lackey case, and the reason there given was "that section 5507 is void, as including within its operation offenses not grounded upon race, color, or previous condition of servitude."

The court took the position that the description of the persons against whom the offenses were committed, as those to whom the right of suffrage is "guaranteed by the fifteenth amendment," did not have the effect of limiting the offense to one based on race prejudice, &c. But there is another and an equally good reason why the section is not appropriate legislation, and that is that the section applies to *every person* who commits the offense and not simply to persons exercising some governmental function. The Karem case covers, in its reasoning, this point. But it will doubtless be urged that these objections relate only to State elections as those cases did; but we again urge that the real point is that these *limitations are the limitations of the fifteenth amendment*, and, because that is the only source of power as to State elections, are the limitations as to State election offenses. They are none the less limitations as to Federal elections, so far as the amendment is concerned.

Can, then, a statute that is based on the fifteenth amendment, and that is meant to apply to offenses committed at all elections, Federal and State, but which is not appropriate legislation under that amendment, and therefore not constitutional as to State election offenses, be limited by judicial construction to Federal elections and upheld by reference to powers granted Congress as to Federal elections only?

We believe the answer to this question is found in the

cases of United States *v.* Reese, 92 U. S., 214, and Trade-mark cases, 100 U. S., 82. The Reese case involved the constitutionality of sections 3 and 4 of the act of May 31, 1870. The indictment charged two inspectors of a municipal election in the State of Kentucky with refusing to receive the votes of certain colored voters in violation of said sections. In determining whether these sections were appropriate legislation under the fifteenth amendment, the court said:

"We are therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make specific, when as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce

the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

This case was followed and approved in United States *v.* Harris, 106 U. S., 629. It may be urged that these cases were ones where the offense charged, or that could be charged, was narrower than the statute, whereas the case at bar, as charged in the indictment, is as broad as the statute, and that the statute can and indeed must be held to apply only to such cases, to wit, Federal election offenses. That this view is not the view of this court the trade-mark cases would seem to settle. In those cases indictments had been found against persons for having in their possession counterfeits of certain trade-marks and selling imitations of such trade-marks. Congress had undertaken to pass laws relative to trade-marks under the constitutional provisions relating to commerce, and had then made punishable violations of such laws. It had failed, however, to limit the trade-mark laws to interstate or foreign commerce, but made them cover all commerce. For that reason the acts were held unconstitutional. The court in its opinion (p. 98) said:

"*It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further.*

"To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in United States *v.* Reese, 92 U. S., 214."

Section 5507 is a very different section in its scope and purpose from section 5508. This latter section is a general law that applies to a conspiracy to injure, &c., any person in the free exercise of a right secured to him by the Constitution and laws of the United States. It applies to all manner of rights other than those simply of suffrage. It is limited to a *Federal right*. No question could arise as to its constitutionality; the only question would be whether it applied to any given case, and since the statute is general and does not show that Congress intended it to apply to any particular state of facts, the question of whether it so applies becomes one of whether Congress had the power to legislate as to the particular case. If it did not, the conclusion is that section 5508 was not meant to cover such a case, the presumption being that Congress intended to pass a constitutional law. So we find the courts holding the section constitutional in Federal elections, as in the Yarbrough case, and holding it not to apply in State elections, as in the Karem case.

But section 5507 plainly applies to all elections, and it requires judicial construction in the face of its plain meaning to restrict it to Federal elections. The court must add the words "at a Federal election" to so narrow it; and this is just what this court has said may not be done. The only case not in accord with this position that we have found is that of United States *v.* Munford, in 16 Federal Reporter, 223. That court held section 5506 constitutional, and distinguished it from the Reese case by holding that when Congress re-enacted section 4 of the enforcement act as section 5506 it modified it sufficient to make that section apply only to Federal elections, "leaving out of it the words which, in the case of Reese, had been considered to bring it under the fifteenth amendment" (p. 227). Judge Hughes in his opinion, concurring, does perhaps go further than Judge Bond; but we submit that his opinion is not in full accord with the Reese case. It is to be remembered that section 5507 presents no such room for construction as section 5506; and even conceding Judge Hughes' position, the *direct reference to the fifteenth amendment* contained in section 5507 prevents the conclusion he thought warranted as to section 5506.

We respectfully submit that section 5507 is unconstitutional, and while Congress may provide for the punishment of bribery by an individual at congressional elections, it has not constitutionally done so, and that the judgment of the district court must be affirmed.

SWAGAR SHERLEY,
Counsel for Appellee.

W. B. DIXON,
Of Counsel.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

L. KAREM, *Plaintiff in Error*,
v.
UNITED STATES, *Defendant in Error.* } No. 1068.

Error to the district court of the United States for the western district of Kentucky.

Submitted Dec. 3, 1902; decided Feb. 3, 1903.

Before Lurton, Day, and Severens, circuit judges.

The plaintiff in error has been convicted under an indictment framed under section 5508 of the Revised Statutes. The indictment in substance charges:

That the plaintiff in error and C. H. Watson and G. P. Bohn and others, to the grand jury unknown, combined and conspired together to injure, oppress, threaten and intimidate certain named persons of color, citizens of the United States and of the State of Kentucky, and lawfully qualified voters under the law of Kentucky, from exercising and enjoying "a right and privilege secured to them * * * by the Constitution and laws of the United States, to wit:

"The right and privilege to vote at the election hereafter named without distinction of race, color or previous condition of servitude."

It is then averred that there was held within the State of Kentucky on November 7, 1899, an election for State and

municipal offices only and that at a certain named precinct the defendant Karem was a judge of election, C. H. Watson a clerk and G. P. Bohn the sheriff holding the election, and that the said persons of color were lawful voters in said precinct and legally entitled to vote at said election and that they each appeared at the polls within the time fixed by law and offered to vote in and at said election, but that in pursuance of the conspiracy aforesaid, the said defendant did prevent them from voting on account of their *race, color and previous condition of servitude.*

To this indictment the defendant Karem demurred upon the ground that the facts stated did not constitute an offense against the laws of the United States.

The demurrer was overruled.

The indictment was dismissed as to the alleged conspirator Bohn. The remaining defendants Karem and Watson entered pleas of not guilty. At the conclusion of all the evidence each of the defendants moved the court to instruct the jury to find against the Government. This motion was allowed as to Watson and disallowed as to Karem, who has sued out this writ to reverse a judgment based upon a verdict of guilty.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court.

Many errors have been assigned and argued but inasmuch as we are of opinion that no offense was charged against the United States in the indictment it is wholly unnecessary to pass upon any of the other questions of either fact or law.

If Congress has not declared the acts charged to have been done by Karem to be an offense against the United States the courts have no power to treat them as such even though the Congress may have the constitutional power to make such acts a crime against the United States (United States *v.* Reese, 92 U. S., 214).

The contention of the Government is that the acts charged constitute an offense indictable and punishable under sections 2004 and 5508.

Those sections are in these words:

2004. "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

5508. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Neither the act from which section 2004 is taken nor any section of the Revised Statutes undertakes in terms to make its violation an offense against the United States or provide for any punishment.

It does nothing more than the amendment does *proprio vigore*. As said in *Ex parte* Yarbrough 110 U. S., 651, the amendment "annulled the discriminating word white," wherever it was found in a State constitution or election law "and thus placed the colored person in the enjoyment of the same right as white persons."

"And," said Justice Miller, in the same case, "such would be the effect of any future constitutional provision of a State

which should give the right of voting exclusively to white people whether they be men or women."

But if section 2004 be regarded as anything more than a declaration of the effect of the fifteenth amendment no penalty is provided for its violation.

In United States *v.* Reese, 92 U. S., 214, 216, the court said:

"If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."

Referring to this section 2004, then the first section of the act of 1870, the court said:

"It is not claimed that there is any statute which can reach this case unless it be the one in question. Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election * * * shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution * * * of the State to the contrary notwithstanding. This simply declares a right without providing a punishment for its violation."

The indictment in this case must therefore be predicated wholly upon section 5508 or the acts charged have not been constituted an offense punishable by the United States. But the constitutional authority for the legislation embodied in this section is very much broader than the fifteenth amendment. It was the sixth section of the enforcement act of 1870. The character of the "rights and privileges" protected is best illustrated by some of the cases in which it has been construed and enforced. The right of a qualified voter to vote for a member of Congress is a right "secured by the Constitution or laws of the United States" within the meaning of section 5508 of the Revised Statutes (*Ex Parte* Yarbrough, 110 U. S., 651).

In the case cited the indictment was brought under sections 5508 and 5520 of the Revised Statutes. The indictment in that case charged that the conspiracy was to deprive certain qualified colored voters on account of their color, race or previous condition of servitude "of the enjoyment of the right and privileges of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States * * * which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States."

The Supreme Court held that the right to vote in a congressional election was a right secured by and dependent upon the Constitution and laws of the United States.

In Lackey v. United States, 46 C. C. A., 189, after quoting from the opinion the argument for that conclusion, we said:

"The judgment of the court was also rested, in part, upon the broader ground that the Congress had the general implied power to protect the elections on which its existence depends from violence and corruption.

"But all that is said in that case upon this aspect of the question was said of elections at which electors or Congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption and fraud. But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the second and fourth sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are Federal elections so far as Federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely State election."

In Waddell v. United States, 112 U. S., 76, an indictment under this section was also sustained. "The particular right held in that case to be dependent on and secured by the laws of the United States, and to be protected by section 5508 of the Revised Statutes against interference by individuals, was

the right of a citizen, having made a homestead entry on public land, within the limits of the State, to continue to reside on the land for five years, for the purpose of protecting his title."

In Logan *v.* United States, 144 U. S., 263, it was held that a citizen of the United States, in the custody of a marshal of the United States under a lawful commitment to answer an offense against the United States, has the right to be protected by the United States against lawless violence, and that this right is a right secured to him by the Constitution and laws of the United States and that a conspiracy to prevent his enjoyment of this right of protection is indictable under section 5508.

None of the cases in which an indictment under this section has been sustained involved a discrimination against voters in a purely State election on account of race, color, or previous condition of servitude.

It is plain that resort can be had to this section only upon the theory that the right to vote at a purely State election is a right or privilege secured by the Constitution or laws of the United States.

But the power of Congress to legislate at all upon the subject of voting at purely State elections is entirely dependent upon the fifteenth amendment (United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542).

The plain purpose of that amendment was to prevent all discrimination by the United States and by the States in the exercise of the suffrage on account of " race, color or previous condition of servitude."

The amendment reads thus:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation.

The well-settled construction of the article is that it does not confer the right of suffrage upon any one (United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542).

In the case last cited the opinion in the circuit court was by Justice Bradley and is reported as U. S. *v.* Cruikshank, 1 Woods, 308, and Federal Cases No. 14897.

In the opinion referred to the learned justice referring to the amendment, said:

"It does not confer the right to vote. That is the prerogative of the State laws. It only confers a right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce."

Referring to the power of Congress to enforce this amendment by appropriate legislation, he said:

"It is not the right to vote which is guaranteed to all citizens. Congress cannot interfere with the regulation of that right by the States except to prevent by appropriate legislation any distinction as to race, color, or previous condition of servitude. The State may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

In United States *v.* Reese, cited above, the court said:

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not.

"If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination;

now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In United States *v.* Cruikshank, cited above, the court said:

"In Minor *v.* Happersett, 21 Wall., 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States *v.* Reese *et al.*, *supra*, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The fourteenth * amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the State, the power of the State

* Evidently a mistake; should be fifteenth.

to prescribe qualification being limited in only one particular.

The right of the voter not to be discriminated against at such elections on account of race or color, is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article.

1st. Legislation authorized by the amendment must be addressed to State action in some form or through some agency.

2d. It must be limited to dealing with discrimination on account of race, color or condition.

These in their order:

First. That State and not individual action is the subject of this article would seem clear from many considerations.

The right to vote in a purely State election being, as we have seen, a right granted by and dependent upon the law of the State is therefore a right which can only be denied or abridged by the State.

The amendment is therefore in terms addressed to State action. Action by the United States and by the State in contravention of this right of non-discrimination on account of race, color or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing constitutions and laws and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color and condition, and that the power of Congress to enforce it is, therefore, limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation.

We think this too narrow a view of the article. Although it has reference to State and not individual action it has a wider scope than the mere nullification or inhibition of State

legislative action and avoids and inhibits, not only State legislation, but all State action of every kind and by every one assuming to exercise the power of the State, whether the State's authority be exceeded or not.

When the Constitution speaks of a State and inhibits the doing of certain things it sometimes includes under the term State every instrumentality or agency of the State which presumes to act by authority of the State, and in other cases the action of the State in its sovereign or legislative character is alone referrrd to.

It is true that this amendment is not limited to the prohibition of "*laws*" denying or abridging the elective function. For this very reason we conclude that legislation enforcing it may be corrective of any State action whether based on State laws authorizing discrimination or not. With the exception of the first clause of the first section of the fourteenth amendment that section is, like the fifteenth amendment, addressed broadly to the State.

The other clauses of that section read as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of the clauses quoted above has been authoritatively construed as addressed to State action in some form and not to mere individual conduct.

Slaughter House case, 16 Wall., 36; *Ex parte* Virginia, 100 U. S., 339; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629, 638; Virginia *v.* Rives, 100 U. S., 313; Civil Rights case, 109 U. S., 3, 11; Chicago, B. & Q. R'd *v.* Chicago, 166 U. S., 226.

In United States *v.* Cruikshank, the Chief Justice said:

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen against another. It simply furnishes an additional guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."

In Virginia *v.* Rives, the court said:

"The provisions of the fourteenth amendment here refer to State action exclusively and not to any action of private individuals."

In United States *v.* Harris, Justice Woods, after citing and commenting upon the earlier cases, said of the fourteenth amendment:

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the law; when on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

Referring to *Ex parte* Virginia, 100 U. S., 15, where a law of Congress prohibiting discrimination in jury service on account of race, color, etc., was upheld as warranted by the last clause of the first section of the fourteenth amendment, the court in the Civil Rights case, 109 U. S., 3, 11, said:

"In *Ex parte* Virginia, 100 U. S., 339, it was held that an indictment against a State officer under this section for ex-

cluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract.

"Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule; and it is against such State action, through its officers or agents, that the last clause of the section is directed.

"The aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering."

In Chicago, Burlington & Quincy R'd *v.* Chicago, 166 U. S., 226, it is said, referring to the fourteenth amendment:

"That the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the main and for the State, is clothed with the State's power, his act is that of the State."

In Logan *v.* United States, 144 U. S., 263, 293, the cases cited above were reviewed and the doctrine to be deduced from them thus formulated:

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by

the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

The principles of interpretation applicable to the first section of the fourteenth amendment are equally applicable to the construction of the fifteenth amendment.

The right to vote in their own elections is derived from and secured by the laws of the State. The amendment simply limits State power in respect to suffrage at State elections by prohibiting discrimination in the enjoyment of the elective franchise on account of race, color or condition. The right to vote in its own election can be conferred only by the State. No one, therefore, but the State can "deny or abridge" the right to vote. The amendment is therefore addressed to the State. Individuals may by unlawful force, or fraud prevent an otherwise lawful voter from voting. But it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged. Individuals cannot deny or abridge the right of suffrage for they cannot confer it. It is a right which is secured by and dependent upon law. Individuals cannot make, construe or administer law; they, therefore, cannot "deny or abridge" a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the fifteenth amendment there must be some act of the State, through its legislative, judicial or executive departments. Some one exercising the power of the State, whether with or without the sanction of the law of the State, must deny to otherwise qualified voters the right to vote on account of race, color or condition.

That would be an act of the State and such act might be made an offense against the United States by virtue of the power granted by the fifteenth amendment. To justify legislation directed to the mere lawless acts of individuals, even though such acts be based upon color or race, would be to enter the domain of the police power of the State. We speak only of purely State elections for the power of Congress over its own elections rests upon altogether different principles.

There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a State or municipal election, even though the intimidation be grounded upon race, color or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the fourteenth and the fifteenth amendments are addressed to State action through some channel exercising the power of the State.

Second. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color or condition.

The act commonly known as the enforcement act, being the act of May 31, 1870, 16 S. L., 140, contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth and fifth. The first has been carried into the Revised Statutes as section 2004. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the fifteenth amendment and therefore null and void. The ground upon which this con-

clusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article (United States *v.* Reese, 92 U. S., 214; Lackey *v.* United States, 46 C. C. A., 189).

Third. It may be conceded that the Congress has power to provide for the indictment and punishment of any person exercising the power of the State who should exclude on account of race, color or previous condition of servitude the vote of lawfully qualified voters even at a purely State election.

But has Congress so legislated?

Section 5508 is plainly not limited to acts done by persons acting under and exercising the power of the State. The indictment charges that the defendant conspirators were officers of election and as such officers, excluded colored voters from voting on account of race, color, etc.

If the case made by the indictment is within this section it is not because it provides specifically for the punishment of the offense charged, but because it comes under the general provision providing for the punishment of any unlawful interference with the free enjoyment of some right or privilege secured by the Constitution or laws of the United States.

This section has for its object the punishment of all persons who conspire to prevent the free enjoyment of any right or privilege secured by the Constitution or laws of Congress without regard to whether the persons so conspiring are private individuals or officials exercising the power of the United States or of a State. Neither does it draw any distinction between a conspiracy directed against the exercise of the right of suffrage based upon race or color, and a conspiracy not so grounded. It is therefore not legislation appropriate to the enforcement of the fifteenth amendment; and if the only warrant for its enactment was that article we

should be obliged to hold that Congress had exceeded its jurisdiction because broad enough to cover wrongful acts without as well as within its jurisdiction. That it is not within the province of the courts to so limit an act by judicial construction as to make it operate only on that which Congress may rightfully prohibit and punish is now a well-settled principle of constitutional interpretation.

> United States *v.* Reese, 92 U. S., 214; United States *v.* Cruikshank, 92 U. S., 542; Trade-mark Cases, 100 U. S., 82; United States *v.* Harris, 106 U. S., 629; Civil Rights Cases, 109 U. S., 3; Lackey *v.* United States, 46 C. C. A., 189.

The case of United States *v.* Reese, above cited, is very much in point. The court had under consideration the constitutionality of sections 3 and 4 of the act of May 31, 1870, now constituting section 5506 of the Revised Statutes.

The indictment charged two inspectors of a municipal election in the State of Kentucky with refusing to receive the votes of certain colored voters in contravention of the terms of the third section of the act.

The section in question was directed to the conduct of election judges and inspectors, but did not limit the operation of the act to exclusions from suffrage on account of race, color or condition.

The court said in speaking of the section then under consideration:

"We find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons, who, by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting. In view of all these facts, we feel compelled to say, that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of

those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts

that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

"We must, therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers, and gave judgment for the defendants."

In United States v. Harris, 106 U. S., 629, 637, section 5519 was held void as not warranted by the Constitution. That section is in these words:

"SECTION 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

It was sought to be supported under the thirteenth, fourteenth, and fifteenth amendments. The court said:

"It is clear that the fifteenth amendment can have no application. That amendment, as was said by this court in the case of United States v. Reese, 92 U. S., 214, 'relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elec-

tive franchise on account of race, color, or previous condition of servitude.' (See also United States *v.* Cruikshank, *id.*, 542; s. c., 1 Woods, 308.) Section 5519 of the Revised Statutes has no reference to this right. The right guaranteed by the fifteenth amendment is protected by other legislation of Congress, namely, by sections 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sections 5506 and 5507, Revised Statutes.

"Section 5519 according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment, by the United States or States, on account of race, color or previous condition of servitude, the right of citizens of the United States to vote."

The court further held that the act was not warranted by either of the other amendments, because it covered cases both within and without the authority of Congress.

Referring to the claim that it might be supported by the fourteenth amendment the court said:

"As, therefore, the section of the law under consideration is directed exclusively against the action of private persons without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause of the fourteenth amendment.',

Assuming that exemption from discrimination at a State election is a "right or privilege secured by the Constitution or laws of the United States" it is a right which originates only in the fifteenth amendment and can only be enforced by legislation directed to State action in some form by which otherwise qualified voters are denied the elective franchise on account of race, or color. This is the limit of the power of Congress under the article.

Section 5508 is not so limited and is not, therefore, appropriate legislation for the enforcement of the fifteenth

amendment. The warrant for the section is found in other provisions of the Constitution, and other sections of the act of 1870, from which this section was taken, carried into the Revised Statutes as sections 5506 and 5507 were intended to enforce this amendment.

We therefore conclude that the offense charged in the indictment is not included within or covered by section 5508.

The judgment must be reversed with directions to sustain the defendants' demurrer to the indictment.